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05-1579

No._____

Supreme Court, U.S.
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In The
Supreme Court of the United States

HENRY E. GOSSAGE,
Petitioner,

v.

OPM AND OSHA (DOL), ET AL,
Respondents

On Petition for Writ of Certiorari to the
U.S. Court of Appeal for the Federal Circuit

PETITION FOR WRIT OF CERTIORAI

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PETITION FOR WRIT OF CERTIORAI

Petitioner, Pro Se Veteran, Henry E. Gossage respectfully petitions for a writ of certiorari to review the judgment of the Federal Circuit in this case.

OPINION BELOW

The opinion of the court of appeals is unreported, 05-3155 (App. A-1). Petitioner filed a motion to retransfer and that Order was denied. Petitioner timely filed for rehearing and denied on February 15, 2006, (App. A-2).

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was entered on January 25, 2006, rehearing denied on February 15, 2006 (Appendix A). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the U[illegible]onstitution provides in relevant part:
No person shall be.. Nor be de[illegible] of life, liberty, or property, without due process of law; nor shall private property be taken f[illegible]ublic use, without just compensation

The Fourteenth Amendment to the U.S. Constitution provides in relevant part:
No state shall..... nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

5 U.S.C. § 1204 Powers and functions of the MSPB
(a) The MSPB shall-(1) hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board under this title, chapter 43 of title 38, or any other law, rule, or regulation, and, subject to otherwise applicable provisions of law, take final action on any such matter;
(m)(2) If an employee or applicant for employment is the prevailing party of a case arising under section 1215 and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

5 U.S.C. § 2108. Veteran; disabled veteran; preference eligible
(2)``disabled veteran" means an individual who has served on active duty in the armed forces, has been separated there from under honorable conditions, and has established the present existence of a service-connected disability (3)``preference eligible" means a disabled veteran;

5 U.S.C. § 2301
(b) Federal personnel management should be implemented consistent
with the following merit system principles: (1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity. (2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

5 U.S.C. § 2302, prohibited personnel practices
(a)(1) For the purpose of this title, ``prohibited personnel practice" means any action described in subsection (b).
(2)(A) ``personnel action" means-(i) an appointment;
(b) Any employee who has authority to take, direct others to take,
recommend, or approve any personnel action, shall not, with respect to
such authority—
(1) discriminate for or against any employee or applicant for employment--
(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 17 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);
(B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);
(D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C.791); or
(4) deceive or willfully obstruct any person with respect to such person's right to

compete for employment;
(5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;
(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;
(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others;
(11)(A) knowingly take, recommend, or approve any personnel action if the taking of such action would violate a veterans' preference requirement; or
(B) knowingly fail to take, recommend, or approve any personnel action if the failure to take such action would violate a veterans' preference requirement; or
(12) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title.

5 U.S.C. § 3113. Restriction on reemployment after conviction of certain crimes
An employee shall be separated from service and barred from reemployment in the Federal service, if-- (1) the employee is convicted of a violation of 18 U.S.C. § 201(b) Bribery of public officials and witnesses.

5 U.S.C. § 3318. Competitive service; selection from certificates
(a) The nominating or appointing authority shall select for appointment to each vacancy from the highest three eligibles available for appointment on the certificate furnished under section 3317(a) of this title, unless objection to one or more of the individuals certified is made to, and sustained by, the Office of Personnel Management for proper and adequate reason under regulations prescribed by the Office. (b)(1) If an appointing authority proposes to pass over a preference eligible on a certificate in order to select an individual who is not a preference eligible, such authority shall file written reasons with the Office for passing over the preference eligible. The Office shall make the reasons presented by the appointing authority part of the record of the preference eligible and may require the submission of more detailed information from the appointing authority in support of the passing over of the preference eligible. The Office shall determine the sufficiency or insufficiency of the reasons submitted by the appointing authority, taking into account any response received from the preference eligible under paragraph (2) of this subsection. When the Office has completed its review of the proposed passover, it shall send its findings to the appointing authority and to the preference eligible. The appointing authority shall comply with the findings of the Office. (2) In the case of a preference eligible described in section 2108(3)(C) of this title who has a compensable service-connected disability of 30 percent or more, the appointing authority shall at the same time it notifies the Office under paragraph (1) of this subsection, notify the preference eligible of the proposed passover, of the reasons therefor, and of his right to respond to such reasons to the Office within 15 days of the date of such notification.

5 U.S.C. § 3330a (VEOA) Preference eligible's; administrative redress
(a)(1) A preference eligible who alleges that an agency has violated such individual's rights under any statute or regulation relating to veterans' preference may file a complaint with the Secretary of Labor.

5 U.S.C. § 3330b. Preference eligibles; judicial redress
(a) In lieu of continuing the administrative redress procedure provided under section 3330a(d), a preference eligible may elect, in accordance with this section, to terminate those administrative proceedings and file an action with the appropriate United States district court not later than 60 days after the date of the election.
(b) An election under this section may not be made-- (1) before the 121st day after the date on which the appeal is filed with the Merit Systems Protection Board under section 3330a(d); or
(2) after the Merit Systems Protection Board has issued a judicially reviewable decision on the merits of the appeal.

5 U.S.C. § 7702. Actions involving discrimination..applicant for employment who--
(A) has been affected by an action which the employee or applicant may appeal to the MSPB, and
(B) alleges that a basis for the action was discrimination prohibited by-- 42 U.S.C. 2000e-16, 29 U.S.C. 206(d), 29 U.S.C. 791, 29 U.S.C. 631, 633a, or any rule, regulation, or policy directive prescribed under any provision of law described in clauses (i) through (iv) of this subparagraph, the Board shall, within 120 days of the filing of the appeal, decide both the issue of iscrimination and the appealable action in accordance with the Board's appellate procedures under section 7701 of this title and this section.

5 U.S.C. § 7703 (b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 60 days after the date the petitioner received notice of the final order or decision of the Board. (2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (~~42 U.~~S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable, notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702

28 U.S.C. § 1254. Courts of appeals; certiorari; certified questions
Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

38 U.S.C. § 4301-4333 (USERRA) provides in relevant part:
Prohibit discrimination against persons because of their service in the uniformed services, Federal Government should be a model employer in carrying out the provisions of this chapter.....does not relieve agencies of their obligation to accord persons entitled to priority consideration.... shall not be denied initial employment

42 U.S.C. § 1981 provides in relevant part: Equal rights under the law
(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. (b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

42 U.S.C. § 1982 provides in relevant part: All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 1983 provides in pertinent part: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges....

42 U.S.C. § 1985. Conspiracy to interfere with civil rights
Preventing officer from performing duties, if two or more persons in any State or Territory conspire to prevent....

42 U.S.C. § 2000e et seq. (Title VII) in pertinent part
It shall be an unlawful employment practice for an employer--to fail or refuse to hire, limit, segregate, or classify his applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

5 CFR § 300.103 Basic requirements.
(c) Equal employment opportunity. An employment practice shall not discriminate on the basis of race, or other non-merit factor.

5 CFR § 731.501 Appeal to the MSPB (2000)
(a) An individual who has been found unsuitable for employment may appeal the decision to the Merit Systems Protection Board (the Board). An employee or appointee who appeals a removal directed by OPM shall notify the employing agency of the appeal at the time it is filed.
(b) Appeal Procedures. The procedures for filing an appeal with the Board are found at part 1201 of Title 5, Code of Federal Regulations.

29 CFR § 1614.302 Mixed case complaints.(a) Definitions—
(1) Mixed case complaint. A mixed case complaint is a complaint of employment discrimination filed with a Federal agency based on race, color, religion, sex, national origin, age or handicap related to or stemming from an action that can be appealed to the Merit Systems Protection Board (MSPB). The complaint may contain only an allegation of employment discrimination or it may contain additional allegations that the MSPB has jurisdiction to address.
(2) Mixed case appeals. A mixed case appeal is an appeal filed with the MSPB that alleges that an appealable agency action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, handicap or age.

29 CFR § 1614.310 Right to file a civil action.
An individual who has a complaint processed pursuant to 5 CFR part 1201, subpart E or this subpart is authorized by 5 U.S.C. 7702 to file a civil action in an appropriate United States District Court:(a) Within 30 days of receipt of a final decision issued by an agency on a complaint unless an appeal is filed with the MSPB; or (g) After 120 days from the date of filing a formal complaint if there is no final action or appeal to the MSPB; or (h) After 120 days from the date of filing an appeal with the MSPB if the MSPB has not yet made a decision

STATEMENT OF THE CASE

This is a federal civil service employment mixed case, encompassing both discrimination and non-discrimination claims. Petitioner brought action against each individual in their individual and official capacity on employment discrimination, veteran employment vested rights (VEOA, USERRA), and violating Plaintiff's civil rights under the color of Federal law. More critical, OPM and OSHA together and collectively intentionally in its efforts did discriminate and deny Petitioner Federal Veteran Preferences, initial federal employment and due process by:

1. failing to disclose critical suitability documentary evidence and procedures;
2. made intentional false statements in support of its May 16, 2001 negative suitability determination;
3. failed to perform a through investigation to the underlying facts in the case

OPM withdrew and rescinded (Appendix E) its two charges in its May 16, 2001 negative suitability action (Appendix H-4), after successfully convincing the MSPB to dismiss Petitioners appeal as moot (Appendix D). OPM is now seeking to re-litigate the rescinded action and the same two charges a second time to avoid liability (Appendix H-4, I-3). Petitioner should have been returned to "status quo ante", with all pay and benefits. OPM's has been granted every relief it has requested from the below decisions, even those in error, Petitioner has obtained no relief. Petitioner raises a pattern of judicial bias towards a Pro Se litigant, arguing my case without legal representation. In all fairness to Petitioner, the more this Court reviews the record and all arguments presented by OPM and OSHA (DOL), coupled by OPM's Motions (Appendix E), MSPB's AJ Freet (Appendix D), USDC (Appendix B), and the Federal Circuit opinion and orders (Appendix A), the more it appears this may be a completely unique situation. Something this Court has not seen before – and really something that is hard to recognize as an issue because there is really almost no reason for it to ever happen. Why would the decisions below offer so much resistance to correcting a rescinded and withdrawn negative suitability action by OPM of a Preference Eligible Disabled Veteran in initial Federal Employment?

Petitioner was the highest scoring candidate, OSHA's #1, most qualified, and only veteran/disabled veteran/preference eligible candidate for OSHA's Industrial Hygienist position in September 2000 (Appendix G-1). OSHA's and OPM's supervisors supported a discriminatory policy to deny Petitioner initial federal employment, based on Petitioners 1992 felony conviction, which is unrelated to the position and duties of an Industrial Hygienist. OSHA requested OPM intentionally rate Petitioner permanently ineligible for federal employment on suitability, in order to bypass a preference eligible disabled veteran and select a non-veteran.

A. Statement of the Facts

1. The factual and procedural background for this matter is undisputed and relatively straightforward. OSHA requested (Appendix G-4, H-1,2,4) to bypass Petitioner, a preference eligible veteran on suitability. OPM debarred Petitioner on the same two charges in its January 27, 1998 (Appendix I) and for a second time on May 16, 2001 (Appendix H) in both negative suitability action:

i.) Criminal or dishonest conduct related to the duties to be assigned
ii.) Intentional false statement or deception or fraud in examination

a. OPM's January 27, 1998 Negative Suitability Action and Debarment
(Appendix F, I-3)

On April 16, 1992, you plead guilty ...and make court ordered restitution.

b. OPM's May 16, 2001 Negative Suitability Action and Debarment
(Appendix D, E, H-3, page 2)

OPM stated, "although the issues were previously adjudicated...specifically, on April 16, 1992, you plead guilty ...failed to make court ordered restitution. These are the same issues OPM relied upon to debar Petitioner from federal employment with OSHA in its 1998. OPM's justification was, "OSHA does not believe that you could serve as a credible federal witness due to your criminal record." (Emphasis added)

Petitioner completed the 1998 debarment action instituted by OPM on July 21, 2000. Petitioner applied for federal employment with OSHA, as an Industrial Hygienist in September 2000. On September 27, 2000, DOL's Chief of Employment, Floria Jones stated, "Our suitability

> files show that his debarment ended on July 21, 2000. I am trying to clarify our obligation as of today with my contact in OPM's suitability office."

Petitioner was referred on a certificate of eligible candidates for the Industrial Hygienist position, as the highest scoring and CPS veteran candidate. Theresa Rasfield (Appendix G-2) memo to the selection official stated, "Your selection must be made in accordance with the rule of THREE

> and veteran's preference. You may not pass over a veteran to select a non-veteran. She further placed emphasis on all candidates will receive consideration for this position without regard to other non-merit factors." (Emphasis added)

Dean Akeda (Appendix G-3) interviewed petitioner and stated the next step would be OSHA to request OPM render a suitability determination. Petitioner was the only remaining eligible candidate and preference eligible veteran candidate for the position. The other two candidates were initially offered the position and declined. Richard Terrill, OSHA Regional Administrator determined Petitioner was an unsuitable candidate. Terrill stated (Appendix G-4),

> "in my judgment, he is unsuitable for consideration as an OSHA employee. I would appreciate your assuring that OSHA' hiring efforts are not further hindered by our having to consider Mr. Gossage for vacant OSHA positions." (Emphasis added)

DOL's Chief of employment, Floria Jones notified Petitioner of their intent to object on the basis of suitability, because Petitioner's incarceration from 1992-1995. DOL filed an SF62, agency request to pass over a preference eligible veteran. The reason was, (Appendix G; H-1,2,4)

> OSHA Compliance Officers must testify in Court on behalf of the Agency. His conviction may effect his creditability.
>
> Mr. Gossage is an applicant for an Industrial Hygienist position in Bellevue, Washington, however we would like to have him removed from consideration for all OSHA Compliance officer positions nationwide for the aforementioned reasons.

Petitioner November 23, 2000 response, objected with OSHA's bypass, based on Petitioner's status as a service connected disabled veteran. DOL reissued the certificate of eligibles and a non-

veteran was again offered the position in June 3, 2001. Petitioner was removed from consideration for the position.

2. OPM conducted its suitability action, based on OSHA's SF62 bypass, and its request to permanently debar Petitioner from employment with DOL. OPM's conducted an FBI background investigation on January 3, 2001. Petitioner had absolutely no criminal charges/conduct, since Petitioners May 1992 incarceration.

In its March 20, 2001 letter from OPM, Benjamin D. Allen made two charges:

a.) Criminal or dishonest conduct related to the duties to be assigned
b.) Intentional false statement or deception or fraud in examination

On May 16, 2001, Karen McCue stated its basis for proposed action are the above two charges. She stated further stated, (Appendix H-3)

i. Although the issues were previously adjudicated, all applicants are subject to suitability determination.

ii. August 1991 King County incident report...based on your commission of those acts between August 1991 and July 1998.

iii. On August 13, 1991, an incident report was filed with the King County Police Department on behalf of your step-daughter. She reported you had sexual intercourse with you 3 to 4 times a year for the preceding 10 years.

iv. You have failed to make court ordered restitution. You made no payments toward restitution.

v. Rated ineligible your application of September 5, 2000 for the position of Industrial Hygienist, filed with OSHA, Bellevue Washington.

vi. Cancelled any eligibilities you may have obtained from this or any applications you may have pending for competitive positions; and,

vii. Debarred you from competition for or appointment to, any position in the competitive service for two years, or until May 16, 2003. (Appendix H-4)

3. Petitioner timely appealed OPM's decision to MSPB Seattle Office and raised both discrimination and non-discrimination claims. Petitioner's status as a disabled veteran was filed with DOL (VETS). AJ Freet denied Pro Se Petitioners discovery requests.

OPM's first motion before the MSPB on January 14, 2002, Agency Notice of Withdrawal and Motion to Dismiss, OPM stated (Appendix E-2),

> Hereby withdraws its debarment of Appellant Henry Gossage, from serving, competing for, or accepting positions in the competitive federal service until May 26, 2003, and reinstates his eligibility for competitive registers. (Emphasis added)
>
> OPM's unilateral determination to withdraw its negative suitability rating and reinstate Appellant's eligibility for competitive registers completely rescinds the action appealed. (Emphasis added)

Pro Se Petitioner agreed in one aspect of OPM's motion, which was the withdrawal of its negative suitability determination, debarment, appellant's eligibility for competitive federal service, and OPM's complete rescinded action.

On March 17, 2002 (Appendix E-3), OPM reiterated in its second motion for dismissal to withdraw its May 16, 2001 (Appendix H-3) negative suitability rating and reinstate eligible for competitive registers completely rescinds the appealed action. OPM further stated pursuant to 5 USC § 1204 (a) (1), (Appendix E-4)

> The board may hear only those over which it has jurisdiction Absent a finding of a specific finding of unsuitability, removal,...the board is not empowered to act in this case. 5 USC § 7512; 5 CFR § 731.501 (emphasis added)
>
> OPM's unilateral determination to withdraw its negative suitability rating and reinstate appellant completely rescinds the action...thus the Board no longer retains subject matter jurisdiction.
>
> Moreover, there is no law or regulation that permits an appeal of a decision made by OPM to pass-over an individual's preference eligibility.

OPM convinced AJ Freet dismissal was appropriate and correct in light of *Vislisel v. OPM*, 29 MSPR 679 (1986) and *Cooper v. Navy*, 108 F.3d 324, 326 (Fed.Cir.,1997). OPM persuaded AJ Freet, petitioner had no appeal rights regarding a pass-over of a preference eligible veteran.

> OPM's withdrawal of its negative suitability determination, Mr. Gossage was free to begin applying for federal government positions. (Emphasis added)

> For all of the reasons herein as well in the agency's previously filed motion, OPM respectfully requests that the ALJ dismiss this appeal.

4. Petitioners Attorney filed Petition for Review on May 14, 2002. OPM stated in its June 7, 2002 response to PFR (Appendix E-4),

> "Because the negative suitability determination was rescinded, OPM argued there was no further action for which the Board had jurisdiction to adjudicate" (Emphasis added)

B. Procedural History

Petitioner initiated this Pro Se complaint on June 15, 2001. (USDC Dkt. 1,7) Petitioner asserted employment discriminatory conduct by Respondents under federal law in violation of 5 U.S.C. § 2302, 5 U.S.C. § 3330a, 38 U.S.C. § 4301-4333, 42 U.S.C. § 1981, 42 U.S.C. § 1983, 42 U.S.C. § 1985, 42 U.S.C. § 2000e et seq.

1. MSPB Initial Decision, April 22, 2002

AJ Freet noted OPM's reinstating the appellant's eligibility for competitive registers and withdrawing its debarment of him from competition for, or appointment to, Federal positions. The appellant has received full relief on these elements. It was OPM that moved the appeal be dismissed as moot. Petitioner objected to OPM's "continued disqualification" for the Bellevue Industrial Hygienist position with OSHA, which is the basis of the original appeal. ALJ granted OPM's motion to dismiss. The only issue remained is OSHA's disqualification request (SF62), which was based on the appellant's felony conviction in 1992 and his resulting incarceration.

2. Petition for Review, September 27, 2004

Petitioner's attorney filed a petition for review before the MSPB on May 14, 2002. OSHA's continued disqualification was the central issue that was the basis for the petition for review before the MSPB. The Board failed to address any of the discrimination claims.

OPM did not file a cross-petition or appeal any issues or claims from the May 14, 2002 MSPB decision. OPM respond to Appellants PFR on June 7, 2002,

> Because the negative suitability determination was rescinded, OPM argued there was no further action for which the Board had jurisdiction to adjudicate" (Emphasis added)

The initial decision by AJ Freet became the MSPB final decision because the two members could not agree on the disposition of the petition for review.

3. US District Court Western Washington in Tacoma, March 24, 2005 (Appendix B)

Petitioner filed Pro Se civil action (C04-5669RJB). Petitioner raised civil rights, discrimination claims, veteran s rights pursuant to VEOA and USERRA, and Prohibited Personnel Practice violations. OPM moved for dismissal on the following EIGHT grounds: (1) the court lacks jurisdiction over DOL and OPM, the only named defendants in this case; (2) the claim under 42 U.S.C. § 1981 should be dismissed because plaintiff has failed to allege that defendants engaged in any discriminatory refusal to contract with him or had any potential or actual contractual relationship with him, and because plaintiff fails to allege that defendants intentionally discriminated against him because of his race; (3) the claim under 42 U.S.C. §1983 should be dismissed because a Section 1983 action cannot be maintained against a federal officer; (4) the case should be dismissed due to improper service; (5) the complaint should be dismissed on the basis of res judicata, collateral estoppel, and claim and issue preclusion; (6) the complaint is barred by the statute of limitations, laches and tolling; (7) the court lacks jurisdiction over plaintiff's claims under the Federal Tort Claims Act (FTCA); and

> (8) the complaint fails to state a claim because plaintiff was not qualified. (Emphasis added, USDC Dk.).

Defendants also request that the court enjoin plaintiff from filing future complaints based on the same facts. OPM argued, "An industrial hygienist provides testimony in legal cases and assists the regional solicitor in case preparation. Plaintiff would not be qualified for the position

because his credibility would be undermined on cross examination if he were to testify about an inspection." (USDC Dkt. 14, Exh E)

USDC granted OPM's dismissal of Petitioners final MSPB complaint with prejudice on January 5, 2005. The USDC stated, Petitioners should not be permitted to by-pass the Court of Appeals for the Federal Circuit by asserting discrimination claims that are without merit and then seek review of the MSPB decision in this court. On March 24, 2005, USDC VACATED its January 2, 2005 decision and transferred the case to the Federal Circuit.

4. US Court of Appeals for the Federal Circuit, January 25, 2006, (Appendix A)
Rehearing denied February 15, 2006

Petitioner filed for retransfer back to the USDC, Petitioner was "UNWILLING to abandon any discrimination claims", pursuant to Federal Circuit Rule 15(c). The Federal Circuit took jurisdiction in a final MSPB decision which contained both discrimination and non-discrimination claims. In its July 5, 1005 ORDER, the court denied retransfer and stated, "Because the Board did not address the discrimination claims, Gossage may not present arguments the merits of his discrimination claims." (Emphasis Added)

OPM argued a restitution issue for the first time before the Federal Circuit, contrary to prior U.S. Supreme Court decisions. The Federal Circuit stated, OPM had contended that Mr. Gossage had only appealed "OPM's determination of unsuitability and cancellation of his eligibility on competitive registers." Thus we agree with OPM that remand is now appropriate, for determination of whether OPM's May 2001 decision was an appealable constructive negative suitability determination and, if so, whether OPM's decision is supported by substantial evidence.

We also agree that remand is required for consideration of Mr. Gossage's discrimination claims. Mr. Gossage has outstanding discrimination claims, and OPM's recission of its cancellation of eligibility and general debarment from competition do not resolve this issue.

REASON FOR GRANTING THE WRIT

I. The Judgment below Conflicts with Decisions of This Court and of Other Circuits

A. The Law of the Case, Judicial Estoppel, or Res Judicata prevents OPM from re-litigating a rescinded and withdrawn negative suitability determination.

B. The Conflict between the Federal Courts in the Jurisdiction in a final MSPB case encompassing both discrimination and non-discrimination claims.

C. OPM's adjudication criteria in Petitioners suitability determination are inconsistent with OPM's procedures and policy.

D. Petitioner's VEOA and USERRA rights were violated.

E. OPM and OSHA discriminated on the basis of non-merit factors unrelated to the position.

A. The Law of the Case, Judicial Estoppel, or Res Judicata prevents OPM from re-litigating a rescinded and withdrawn negative suitability determination.

OPM prosecuted and debarred Petitioner on the same charges in 1997-1998 and in 2000-2001, thus denying Petitioner his federal veteran preference rights to initial employment with OSHA. OSHA used the same justification and reasoning to bypass a preference eligible veteran in 1997 (Appendix I-1,2,4) and for a second time in 2000 (Appendix H-1,2,4) in direct violation of 5 U.S.C. § 2302, prohibited personnel practices

OPM convinced AJ Freet, OPM's decision to rescind the May 16, 2001 negative suitability action, reinstate Petitioners eligible to all federal employment, mooted Petitioners appeal, therefore dismissal was appropriate. ALJ Freet granted OPM request to withdraw and dismiss Petitioners appeal. OSHA's continued disqualification was the central issue that was the basis for the petition for review before the MSPB, the Federal Circuit has vacated that decision. Petitioner is entitled to receive whatever rights and benefits he would have had if the rescinded

action had never occurred. *Davis v. Army*, 41 MSPR 67, 69 (1989). OPM's withdrawal from an appeal is an act of finality that removes an appeal from the Board's jurisdiction. *Spencer v. R.R. Ret.*, 93 MSPR 80, 82 (2002). The relinquishment of one's right to appeal to the Board must be by clear, unequivocal and decisive action. *Etheridge v. VA*, 67 MSPR 53, 56 (1995). *Brown v. Navy*, 71 MSPR 451, 453-54 (1996), *Brown v. VA*, 68 MSPR 163 (1995).

OPM initially argued before the MSPB its rescinded action could not be subject to an appeal. OPM argued EIGHT different issues before the USDC, including collateral estoppel. (Emphasis added) OPM had a change in heart before the Federal Circuit and now disagrees with its own previous two motions to dismiss, OPM Response to Petitioners PFR before the MSPB and the April 22, 2002 MSPB decision. OPM did not file a cross-petition for review, as it did in *Edwards v. Dept. of State*, DC-0731-04-0270-I-1 (April 29, 2005).

The administrative judge's was correct not to consider OPM's May 16, 2001 negative suitability determination. The original basis of Petitioners appeal before the MSPB was OPM's May 2001 negative suitability action, OPM rescinded this action in its motions before the MSPB. OPM is seeking anew second suitability request and their request is untimely and discussion of the merits is irrelevant to the issue of timeliness. *Criddell v. U.S.P.S.*, 60 MSPR 30, 34 (1993). Arguments raised for the first time in a reply brief are not properly before this Court. *Herring v. Sec'y, DOC.*, 397 F.3d 1338, 1343 (CA 11, 2005) *Ogden v. San Juan County*, 32 F.3d 452, 455 (CA10, 1994); *U.S. v. Wright*, 215 F.3d 1020, 1030 n.3 (CA9, 2000); *Dixon v. Page*, 291 F.3d 485, 489 (CA7, 2002). *Leverette v. Louisville*, 183 F.3d 339, 342 (CA5, 1999); *Brickwood v. Datanet*, 369 F.3d 385, 390 (CA4, 2004).

1. The Supreme Court explained, 'if a court is on notice that it has previously decided the issue presented, the court may dismiss the action sua sponte, even though the defense has not been raised." *Arizona v. California*, 530 U.S. 392, 412, 147 L. Ed. 2d 374, 120 S. Ct. 2304 (2000). OSHA's reasoning in its SF62 agency request to pass over a preference eligible disabled veteran to select a non-preference eligible for a second time was,

> OSHA Compliance Officers must testify in Court on behalf of the Agency. His conviction may effect his creditability.

This is the identical SF62 by-pass request OSHA used in its March 21, 1997 to have Petitioner debarred from federal employment until July 2000, and again in November 17, 2000.(Appendix H-2, I-2) McCue stated in OPM's May 16, 2001 letter to Petitioner,

> "although the issues were previously adjudicated... OSHA's request to pass over you" (App. D)

The "strict application of the doctrine of *res judicata*", prevented OPM from re-litigating the same pass-over action in 1997-8 and again in this 2000-1 appeal. The decision below conflicts with other Courts of Appeals holding that an adverse judgment from which no appeal has been taken is res judicata and bars any future action on the same claim, even if an authoritative contrary judicial decision on the legal issues involved is subsequently rendered in another case. This Court stated, "[a] final judgment on the merits of an action precludes the parties . . . from re-litigating issues that were or could have been raised in that action." *Federated v. Moitie*, 452 U.S. 394, 398 (1981); *Commissioner v. Sunnen*, 333 U.S. 591, 597(1948); *Cromwell v. Sacramento*, 94 U.S. 351, 352-353(1877).

> "It is the generally accepted rule in civil cases that where less than all of the several co-parties appeal from an adverse judgment, a reversal as to the parties appealing does not necessitate or justify a reversal as to the parties not appealing"(Emphasis added) *E. g., NAB v. FCC*, 180 U. S. App. D. C. 259, 265, 554 F.2d 1118, 1124 (1976)

Clouatre v. Houston Fire & Cas. Co., 229 F.2d 596, 597-598 (CA5, 1956); *Appleton Toy & Furniture Co.* v. Lehman Co., 165 F.2d 801, 802 (CA7, 1948); *Ripperger v. A.C. Allyn & Co.*, 113 F.2d 332, 333 (CA2, 1940), cert. denied, 311 U.S. 695 (1940).

2. In Petitioner objection to OPM's Motion to Withdraw, Petitioner agreed to OPM's withdrawal of its negative suitability determination, reinstating the appellant's eligibility for competitive registers and withdrawing its debarment of him from competition for, or appointment to Federal positions. Petitioner was free to begin applying for federal government positions. (Emphasis added)

The Federal Circuit decision contradicts the Law of the Case Doctrine, which precludes OPM's from rearguing its withdrawn/rescinded May 16, 2001 suitability action. The law of the

case doctrine was developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit; it thus regulates judicial affairs before final judgment, not preclusion by final judgment. *Griffin v. OPM*, 75 MSPR 263, 269 (1997); *Peartree v. U.S.P.S.*, 66 MSPR 332, 339 (1995). Under the law of the case doctrine, a tribunal will not reconsider issues that have already been decided in an appeal. *Camastro v. DOJ*, 86 MSPR 267, 271 (2000); *O'Connell v. Navy*, 73 MSPR 235, 240 (1997).

OPM did not file a petition for review challenging any decision from AJ Freet's April 22, 2002 initial MSPB decision. The failure to raise an issue in an appeal constitutes a failure to exhaust remedies with respect to that question and deprives the court of jurisdiction to hear those issues. *Vargas v. INS*, 831 F.2d 906, 907-908 (CA9, 1987). OPM cannot challenge upon appeal what he failed to challenge before the Board. Its failure to make such arguments earlier, will not consider any error in the Board's decision based on that argument, for it is deemed waived. *Bosley v. MSPB*, 162 F.3d 665, 668 (Fed.Cir. 1998); *White v. DOJ*, 328 F.3d 1361, 1372 (Fed.Cir. 2003); *Miller v. MSPB*, 06-3079 (Fed. Cir May 4, 2006).

As explained by the United States Supreme Court, "objections to the proceedings of an administrative agency [must] be made while it has an opportunity for correction in order to raise issues reviewable by the courts." *U.S. v. Tucker Truck Lines*, 344 U.S. 33, 37 (1952). This court's standard for assessing whether an issue was adequately raised before the administrative agency is that "the issue must be raised with sufficient specificity and clarity that the tribunal is aware that it must decide the issue, and in sufficient time that the agency can do so." *Wallace v. Air Force*, 879 F.2d 829, 832 (Fed Cir. 1989); *Conant v. OPM*, 255 F.3d 1371 (Fed. Cir. 2001). Therefore, OPM's restitution claim is reviewable by the Federal Circuit only if OPM raised this issue before the Board with sufficient specificity and clarity to make the tribunal aware of the issue.

3. OPM's rescinded negative suitability action, Petitioner's reinstatement eligible to all Federal Employment, OPM's withdrawal and dismissal, no suitability deficiencies remain in Plaintiff's September 2000 Federal Employment Application with OSHA.

Respondents are judicially estopped from denying Appellant was "Qualified and Suitable" for the OSHA position, "but for" the unlawful adverse employment action taken by OPM and OSHA in direct violation of 5 U.S.C. § 2302. Respondents have been playing fast and loose with the courts to suit the exigencies of their self interest in preventing Petitioner from federal employment. Judicial Estoppel is an equitable doctrine which prevents OPM from adopting inconsistent positions in the same or related litigation." *U.S. v. 49.01 Acres of Land*, 802 F.2d 387, 390 (CA10, 1986). see 18 Moore's Federal Practice § 134.30, p. 134-62 (3d ed. 2000) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding"); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4477, p. 782 (1981) ("absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory")

OPM stated, Petitioner is eligible to all Federal Employment. On the other hand, Petitioner is not eligible for federal employment with DOL (OSHA). In *Pegram v. Herdrich*, 530 U.S. 211, 120 S. Ct. 2143 (2000), the Supreme Court cited the Rissetto case for the proposition that "judicial estoppel generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Pegram*, 530 U.S. at 228 n. 8.

OPM convinced ALJ Freet in its motions before the MSPB, its decision to rescind the May 16, 2001 negative suitability determination and reinstate Petitioners eligible to all federal employment, mooted the appeal and dismissal was appropriate. OPM is now taking a contrary position before the Court. This Court explained in *New Hampshire v. Maine*, 532 U.S. 742, 749, 149 L. Ed. 2d 968, 121 S. Ct. 1808 (2001),

> Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

OPM successfully urged MSPB and obtained its desired action, having Petitioners appeal dismissed as being moot, OPM is estopped from taking a contrary position in a subsequent proceeding where its interests have clearly changed. *Davis v. Wakelee*, 156 U.S. 680, 689, 39 L. Ed. 578, 15 S. Ct. 555 (1895).

B. The Conflict between the Federal Courts in the Jurisdiction in a final MSPB case encompassing both discrimination and non-discrimination claims.

A final decision from the MSPB exhausts an applicant's administrative remedies and allows him to seek judicial review in the appropriate U.S. District Court. See *McAdams v. Reno*, 64 F.3d 1137, 1141 (CA8, 1995); *Sloan v. West*, 140 F.3d 1255, 1257 (CA9, 1998); *Seay v. TVA*, 339 F.3d 454 (CA6 2003). Petitioner clearly established the U.S. District Courts jurisdiction pursuant to 29 C.F.R. § 1614.302, 1614.310 and 5 U.S.C. 7702. *Afifi v. Interior*, 924 F2.d 61 (CA4 1991). The final MSPB final decision was September 27, 2004. This final MSPB decision exhausted Petitioners administrative remedies. Acting Chairman McPhie'stated,

> "The appellate raised claims of discrimination based on race, age, and disability" (¶7)

A mixed case complaint is a complaint of employment discrimination filed with a Federal agency based on race, color, religion, sex, national origin, age or handicap related to or stemming from an action that can be appealed to the Merit Systems Protection Board (MSPB). A mixed case appeal is an appeal filed with the MSPB that alleges that an appealable agency action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, handicap or age. Judicial review of decisions of the Merit Systems Protection Board is authorized pursuant to 5 U.S.C. § 7703.

> Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

Review of a final MSPB determination in "mixed" case lies solely in a district court. *See* 5 U.S.C. § 7703(b)(2); *Wells v. Shalala*, 228 F.3d 1137, 1143 (CA10, 2000). *Williams v. Army*, 715 F.2d 1485, 1487 (Fed. Cir. 1983) The District courts have jurisdiction to review "mixed" cases, in which an action involves both a Merit Systems Protection Board appeal and a discrimination claim. *Aldrup v. Caldera*, 274 F.3d 282, 285-86 (CA5, 2001); *Doyal v. Marsh*, 777 F.2d 1526, 1536 (CA11, 1985); *Coons v. Treasury*, 383 F.3d 879 (CA9, 2003); *see also Sloan v. West*, 140 F.3d 1255, 1261 (CA9, 1998); *Austin v. MSPB*, 136 F.3d 782, 783 (Fed. Cir. 1998)

In previous cases before the Federal Circuit, the circuit held an individual wishes to appeal to this court from an unfavorable decision in a mixed case; he must abandon his discrimination claim. *Daniels v. U.S.P.S.*, 726 F.2d 723, 724 (Fed. Cir.1984). The Federal Circuit retransferred jurisdiction to the District Court, after it disposed of the first claim in Cooper's complaint, which relates to the appeal from the Board's jurisdictional ruling, it does not dispose of the remaining three claims. *Cooper v. Navy*, 108 F.3d 324, 326 (Fed. Cir. 1997). Fain was required to submit a "Statement Concerning Discrimination" pursuant to Federal Circuit Rule 15(c), thus coercing Fain into waiving her discrimination claims. *Fain v. Education.*, 05-3002, 05-3003 (Fed Cir 2005).

In *Vandegrift v. Agriculture*, 06-3015 (Fed.Cir. March 14, 2006), the Federal Circuit had jurisdiction to review decisions of the Merit Systems Protection Board pursuant to 28 U.S.C. § 1295(a)(9). Under § 1295(a)(9), this court lacks

> jurisdiction to review a mixed case appeal decided on the merits that involves allegations of discrimination and retaliation without a waiver of such claims. See *Williams v. Army*, 715 F.2d 1485 (Fed. Cir. 1983) (en banc).

The district court reviews the MSPB's determination of the non-discrimination claim under a deferential standard pursuant to 5 U.S.C. § 7703(c), but reviews the discrimination claim de novo. *Washington v. Garrett*, 10 F.3d 1421, 1428 (CA9, 1993).

C. OPM's adjudication criteria in Petitioners suitability determination are inconsistent with OPM's procedures and policy.

The Federal Civil Service Reform Act has an intricate set of administrative policies and procedures in the hiring Veterans. The Supreme Court has long recognized that a federal agency is obliged to abide by the regulations it promulgates. These administrative policies and procedure must be strictly adhered to; otherwise they are subject to invalidation and may raise a constitutional question. *Accardi v. Shaughnessey*, 347 U.S. 260, 74 S.Ct. 499 (1954); *U.S. v. Caceres*, 440 U.S. 741, 751 n.14, 99 S. Ct. 1465 (1979); *Morton v. Ruiz*, 415 U.S. 199, 235, 94 S. Ct. 1055, 1074 (1974); *Service v. Dulles*, 354 U.S. 363, 372, 77 S. Ct. 1152, 1157(1957). OPM's failure to follow its own regulations "tends to cause unjust discrimination and deny adequate notice" and consequently has resulted in a violation of Petitioner's constitutional right to due process. *See Vitarelli v. Seaton*, 359 U.S. 535, 545, 547, 3 L. Ed. 2d 1012, 79 S. Ct. 968 (1959)

1. Agency suitability referral requirements are established by OPM (Appendix J). According to OPM's suitability referral chart, OPM established a three years cutoff for major and substantial issues (Emphasis added). OPM clearly exceeded its own policy and procedures and went beyond its scope with Petitioner's suitability adjudication. OPM has established suitability adjudication policy and procedures to determine if an agency should refer an applicant for investigation, and following referral, is the referred conduct is disqualifying:

1. Seriousness of the issue (Rank A-D)
2. Control Date of the Issue
    a. Do no downgrade any issue that occurred 36 months, prior to the control date
    b. Down grade one letter, 37-72 months
    c. Down grade one letter, 73-108 months

d. Any issue is more than 108 months should not be considered for adjudication, unless it is a statutory debarment (Emphasis added)

3. If the serious issue is a rank D, the adjudicator should rate the person unsuitable.

Petitioner had no disqualifying issues which would have precluded Petitioner from federal employment. Petitioner had no additional criminal conduct, since 1991. *Stewart v. OPM*, 7 MSPB 746 (1981); *Allen v. OPM*, 22 MSPR 178 (1984).

Petitioner's 1991 felony offense (Rank D) was 109 months prior to the September 2000 application for federal employment. Petitioner had already served a prior debarment on this same issue. OPM's suitability policy and procedures should not have considered this issue a second time in its May 2001 suitability determination, this is res judicata.

2. Intentional false statements or deception or fraud in examination or appointment may form a basis for finding an individual unsuitable; the specific intent to make such a false or fraudulent statement may be inferred when the alleged misrepresentation was made with reckless disregard for the truth, and proof of such intent may be based on circumstantial evidence. *See Devitto v. OPM*, 61 MSPR 297, 302 (1994). To establish unsuitability based on falsification, the agency must show that the information was incorrect and that the applicant knowingly supplied incorrect information with the intention of defrauding the agency. *See, e.g., Naekel v. DOT*, 782 F.2d 975, 977 (Fed. Cir.1986*). Kungys v. U. S.*, 485 U.S. 759, 770, 99 L. Ed. 2d 839, 108 S. Ct. 1537 (1988); *U.S. v. Gaudin*, 515 U.S. 506; 115 S. Ct. 2310; 132 L. Ed. 2d 444(1995).

D. Petitioner's VEOA and USERRA rights were violated.

Pursuant to CSRA, selection must be made from the highest three eligible on the certificates that are available for the job--the "rule of three". The agency is prohibited by law in the selection of a non-preference eligible veteran with the same or lower score pursuant to 5 USC § 3317 and § 3318. (Appendix G-2) OSHA initiated its November 2000 SF62 request to intentionally and permanently pass over Petitioner, a preference eligible disabled veteran and

select a non-veteran. Petitioner status as a disabled veteran is a cognizable claim of discrimination under VEOA and USERRA.

1. Under the VEOA provision, Petitioner's was denied initial employment based on his status, as a disabled veteran is cognizable. *Slentz v. U.S.P.S.*, 92 MSPR 144, ¶ 8 (2002); *Bagunas v. U.S.P.S.*, 92 MSPR 5, ¶¶ 17, 18 (2002); *cf. McBride v. U.S.P.S.*, 78 MSPR 411, 415 (1998); *Henderson v. U.S.P.S.*, 95 MSPR 454, ¶ 6 (2004); *Jasper v. U.S.P.S.*, 73 MSPR 367, 369 (1997). Petitioner has established a prima facie case of disparate treatment by showing that Gossage was a qualified member of a protected class and was subjected to an adverse employment action in contrast with similarly situated employees outside the protected class. *Wilson v. B/E Aerospace*, 376 F.3d 1079, 1087 (CA11, 2004).

The VEOA provides redress for a preference eligible veteran "who alleges that an agency has violated . . . [his or her] rights under any statute or regulation relating to veterans' preference." 5 U.S.C. § 3330a(a)(1)(A) Veterans' preference rights are defined by the Veterans' Preference Act of 1944 ("VPA"), Pub. L. No. 78-359, 58 Stat. 387 (codified at 5 U.S.C. §§ 2108, 3309-3320), and its attendant regulations, see 5 CFR § 302.101-302.403 (2005).

2. The Federal Circuit found in *Sheehan v. Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001), "the USERRA prohibits discrimination in employment on the basis of military service." Moreover, "because USERRA was enacted to protect the rights of veterans and members of the uniformed services, it must be broadly construed in favor of its military beneficiaries." *Hill v. Michelin N. Am., Inc.*, 252 F.3d 307, 312-13 (CA4, 2001); *Coffy v. Republic Steel*, 447 U.S. 191, 196, 100 S. Ct. 2100, 65 L. Ed. 2d 53 (1980) (predecessor statute VRRA was "to be liberally construed for the benefit of the returning veteran"); *McGuire v. UPS*, 152 F.3d 673, 676 (CA7, 1998) ("USERRA is to be liberally construed in favor of those who served their country.")).

It is settled that USC 42 § 1983 authorizes actions to enforce the rights of individuals under federal statutes as well as under the Constitution. See *Maine v. Thiboutot*, 448 U.S. 1, 4, 65 L. Ed. 2d 555, 100 S. Ct. 2502 (1980).

E. OPM and OSHA discriminated in violation of Title VII on the basis of non-merit factors unrelated to the position.

Congress has enacted 5 U.S.C. § 2302, prohibited personnel practices involving any personnel action used to discriminate for employment on the basis of conduct which does not adversely affect the performance of the applicant. See EEOC 79-10, October 20, 1978; EEOC 81-7, November 12, 190; EEOC 79-04, October 6, 1978. This Court sated in Griggs, Congress's intention in enacting Title VII was to invalidate all employment practices which in their final effect or consequences, discriminate. *Griggs v. Duke Power*, 401 U.S. 424 (1971); *Robinson v. Lorilland*, 444 F2d 791(CA4, 1971). It is unlawful, absent business necessity and job-related. *Green v. Missouri*, 523 F2d 1290 (CA8, 1975); *Richadrson v. Hotel Corp.*, 332 F.Supp 519, (ED LA, 1971) aff'd. 468 F2d 951 (CA5, 1972). It is unlawful under Title VII to disqualify the individual because of the conviction, if that the offense for which an applicant has been convicted is not job related. (Emphasis Added) *Carter v. Gallagher*, 452 F2d 315 (CA8, 1971); cert. denied, 406 U.S. 950 (1972).

Petitioner 1992 conviction was not a statutory debarment to federal employment, nor was it related 5 U.S.C. § 3113. Restriction on reemployment after conviction of certain crimes, pursuant to 18 U.S.C. § 201(b) Bribery of public officials and witnesses.

The MSPB found Allen eligible for federal employment, his criminal conduct occurred 12 years earlier, served 10 years and was on parole. *Allen v. OPM*, 22 MSPR 178 (1984). In relying on Stewart, the Board held, "as requiring one who has

> been convicted of a crime must continue to commit violent acts in order to be rated ineligible." (Emphasis Added) *Stewart v. OPM*, 7 MSPB 746 (1981)

In the dismissal action of an employee, the DC Circuit reinstated Gloster and held her conduct was not related to the duties to be assigned. *Gloster v. GSA*, 720 F2d 700, 703 (CADC 1983). The 9th Circuit vacated the removal action of a navy employee for sexual abuse for three years, no statute or regulation that permits an agency to presume nexus. *DE v. Navy*, 721 F2d 1165 (CA9, 1983). Greater judicial scrutiny is imposed in removal actions based upon off-duty misconduct. *Norton v. Macy*, 417 F2d 1161 (CADC, 1969); *Doe v. Hampton*, 566 F2d 265 (CADC, 1977); *Young v. Hampton*, 568 F2d 1253 (CA7, 1977); *Bonet v. U.S.P.S.*, 661 F2d 1071 (CA5, 1981).

ARGUMENT

OPM conducted its criminal background investigation on Petitioner from the agency's Crime Records Center and found Petitioner did not engage in any "criminal or dishonest conduct", since 1991 and which were related to the duties she would be assigned at OSHA. OPM failed to disclose this information to the MSPB. Petitioner did not have any restrictions to federal employment pursuant to 5 U.S.C. § 3113, other than those created by OSHA and OPM, with the intent to discriminate (Appendix G-4).

OPM or OSHA produced no new evidence of any convictions, charges, arrests, and warrants since Petitioners 1995 release. Respondents intentionally falsified their own records with the purpose to defraud the Petitioner from Federal Employment. *See Tucker v. U.S.*, 624 F.2d 1029 (Ct.Cl, 1980); *Cadena v. DOJ*, 3 MSPB 390 (1980); *Allen v. USPS*, 2 MSPB 582 (1980). Intent is a state of mind which is generally proven by circumstantial evidence. *Filson v. FAA*, 7 MSPB 50 (1981). The CSRA hiring process for a CPS Veteran has been tainted by OSHA and OPM with significant procedural irregularities, which has invalidated the both agencies hiring process. The clear intent from OSHA's Floria Jones, Chief of Employment and Richard Terrill, Regional Administrator's actions is to permanently deny Henry Gossage this employment Veteran "Preference". This is a deprivation not only of present government employment but also of all future opportunities. OPM's false statements to support its 2001 negative suitability

determination is clearly in violation of 5 U.S.C. § 2302 (prohibited personnel practice), discrimination statutes, and Veteran Preferences (USERRA, VEOA). The underlying discriminatory motive of the agencies is certainly a question for a jury. The refusal to give Petitioner an entitled Veteran Preference by statue is no small injury. This "substantial adverse effect" under these circumstances would constitute a restriction on Petitioner's liberty *New York v. Soto-Lopez*, 476 U.S. 898; 106 S. Ct. 2317 (1986). The right to liberty is implicated when the OSHA's intent to permanently deny Petitioner employment and veteran preference. There are considerable inconsistencies in OPM's policy and procedures in adjudicating suitability issues. OPM and OSHA (DOL) have been dishonest in devising a scheme to deny Petitioner Federal Employment. These false statements and rebutted charges were acted with reckless disregard by OPM, in a conscious purpose to deny Petitioner his 5th amendment right to a property interest in obtaining a statutory veteran preference in federal employment and permit OSHA to by-pass a preference-eligible veteran. Property interests stem from an independent source, such as federal laws and agency procedures. *Board of Regents v. Roth*, 408 U.S. 564, 573, 577; 92 S.Ct. 2701 (1972). Theresa Rasfield memo to the selection official stated, "Your selection must be made in

> accordance with the rule of THREE and veteran's preference. You may not pass over a veteran to select a non-veteran. She further placed emphasis on all candidates will receive consideration for this position without regard to other non-merit factors. (Emphasis added) (Appendix G-2)

Petitioner was severely prejudiced by the agencies improper participation in this negative suitability employment action, by intentionally falsifying material facts to support its May 2002 negative suitability determination. Filing of false statements were prosecuted in *U.S. v. Egenburg*, 441 F.2d 441, 444 (CA2, 1971)

Plaintiff established a prima facie case of discrimination under the McDonnell Douglas framework by showing the pertinent prima facie facts under the traditional burden-shifting analysis from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Petitioner is (1) a member of several protected classes (preference-eligible disabled

veteran, Age, Race, and Physical Disability); (2) was OSHA's #1 Candidate and qualified; (3) despite being qualified and suitable, Petitioner was rejected; and (4) after he was rejected, OSHA filled the position with a lower scoring non-veteran and non-affirmative action candidate. OPM and OSHA's justification to discriminate were in violation of its own policy and procedures in hiring, 5 U.S.C. § 2302, USERRA, and VEOA. OPM and OSHA decisions were pretext, OPM intentionally made false statements from official documents and manipulated the hiring process to render a negative suitability action.

OPM rescinded its May 16, 2002 negative suitability action and debarment (Emphasis Added) (Appendix E). OPM restored Appellant eligible to all federal employment and was free to begin applying for federal government positions. This statement by OPM meant Petitioner was eligible for all federal positions, including OSHA or DOL. Accordingly, Petitioner had no employment disqualification factors which would render Petitioner ineligible federal employment. The only disqualifications imposed by OPM and OSHA (DOL), were pretext in nature to support their underlying motive to permanently discriminate against Petitioner.

Once OPM rescinded its original suitability action, AJ Freet lacked the employment authority to make a hiring decision for OSHA. Agency specific hiring decision remained with the agency (OSHA). OPM's sole authority was to make an independent suitability determination, not a hiring decision. Pursuant to Fed. R. Civ. P. 2-3 and OPM's rescinded action, AJ Freet held no other relief could be granted to Appellant, because Petitioner was eligible all federal employment, which also include OSHA, as a federal agency. With this rescinded action, the MSPB and Federal Circuit should have been returned Appellant to a "Status Quo Ante", including all back pay, benefits, and privileges at the GS11 (Step 10) range, to the September 2000 position but for the illegal action. OSHA's decision to permanently excluded Petitioner from employment, Petitioner is entitle to front pay and benefits at the GS12 (Step 10) range.

OPM seeks to re-litigate the same rescinded/withdrawn action to justify its denial of a preference eligible veteran to federal employment. Depending which court and circumstances, OPM has raised inconsistent arguments:

a. there is no law or regulation that permits an appeal of a decision made by OPM to pass over an individual's preference eligibility, (March 17, 2002);

b. OPM requested MSPB deny PFR pursuant 5 CFR § 1201.115(d), (June 7, 2002 OPM's Response to Petitioner PFR);

c. Plaintiff would not be qualified for the position because his credibility would be undermined on cross examination if he were to testify about an inspection, (OPM 's argument before USDC);

d. Petitioner did not complete the restitution payments (OPM's Argument before the Federal Circuit)

This continued action by the agencies, support Petitioners argument the agencies are determined to intentionally discriminate by permanently deny Petitioner his Veteran Preferences to Federal employment under VEOA and USERRA. The actions by Respondents are contrary to Congress's intent of 38 USC § 4301(b), "Federal Government should be a model employer in carrying out the provisions of this chapter." (Emphasis added)

1. The Federal Circuit opinion on the basis of Petitioners appeal is contradictory to itself.

The Federal Circuits ju[illegible]diction lays solely in appeals in non-discrimination claims from a final MSPB decision. The USDC Court had jurisdiction to adjudicate Petitioners claims of discrimination and non-discrimination issues raised before the MSPB, the Federal Circuit lacked this authority to review this case pursuant to 5 U.S.C. § 7702, 7703. OPM's insistence Petitioners appeal was moot and should be dismissed does not absolve the MSPB's failure to adjudicate all discrimination and non-discrimination claims properly raised before the board. The MSPB is mandated by law to adjudicate all claims within 120 days; otherwise the decision becomes a judicially reviewable action in the appropriate USDC. The MSPB had 3 years, opportunity, and

jurisdiction to decide all claims and issues in Petitioners June 2001 appeal (refilled in October) and failed to adjudicate all claims. Jurisdiction now lies in the appropriate USDC and not the Federal Circuit.

If Petitioner only appealed "OPM's determination of unsuitability and cancellation of his eligibility on competitive registers", as the Federal Circuit court suggests, why would the Circuit consider a remand is required for consideration of Mr. Gossage's discrimination claims? The complete record of appeal, including the September 27, 2004 MSPB decision, acknowledged Petitioner did raise and had outstanding discrimination and compensatory damage claims.

OPM's rescinded its negative suitability action and reinstated Petitioner eligible to all federal employment. Petitioner's outstanding discrimination and non-discrimination claims are removed from the jurisdiction from the federal circuit and back into the District Court. The Federal Circuit failed to recognize OPM original argument before the AJ in sustaining OSHA objection to by-pass Petitioner on the basis, "there is no law or regulation that permits an appeal of a decision made by OPM to pass over an individual's preference eligibility." OPM's original argument before AJ Freet was based on Petitioners qualifications to testify in court. Industrial Hygienist is not classified as a law enforcement position and has no statutory debarments or restrictions, which would prevent Petitioner from performing this job, other than those self imposed discriminatory motives raised by the agencies. Petitioner was well qualified for OSHA's Industrial Hygienist position, OPM argument was inconsistent with *Vislisel v. OPM*, 29 MSPR 679, 680 (1986). The Circuit retransferred its discrimination case back to the USDC, based on lack of jurisdiction. *Cooper v. Navy*, 108 F.3d 324 (Fed.Cir. 1997).

OSHA filed an SF-62 with OPM, requesting Petitioner be removed from a certificate of eligible's based on his "suitability." OPM initially sustained OSHA's objection and subsequently vacated it negative suitability action. Petitioner was suitable and qualified for the position. OPM's rescinded action, Petitioners VEOA and USERRA veteran's preference rights were violated. Petitioner had a 5th amendment vested right to the position, pursuant to the Rule of Three, an

agency may not by-pass a veteran to select a lower scoring or equal non-veteran candidate. This concept goes to the true meaning and heart of Congress's intent to protect the veteran's rights under the VEOA and USERRA.

2. OPM's May 16, 2001 negative suitability action is based on the same criminal conduct raised in its 1998 suitability action.

OSHA and OPM used Petitioners 1991 Charges and 1992 conviction and incarceration to justify a second by-pass over the same conduct. Res Judicata precludes both agencies from revisiting the same conduct a second time after Petitioner was subject to a previous adverse action on these two same charges and SF62 by-pass request by OSHA. OPM found Petitioner unsuitable at the insistence of OSHA and specifically by Richard Terrill, OSHA Regional Administrator determined Petitioner was an unsuitable candidate. Terrill stated,

> "in my judgment, he is unsuitable for consideration as an OSHA employee. I would appreciate your assuring that OSHA' hiring efforts are not further hindered by our having to consider Mr. Gossage for vacant OSHA positions." (Emphasis added)

These charges were based on the same criminal conduct adjudicated in June 30, 1998 MSPB decision and appealed. OPM conducted its background investigation in January 2, 2001 and found no criminal conduct since Petitioners release in 1995. OPM intentionally falsified the facts Petitioner had engaged in criminal conduct from August 1991through July 1998 to support its second negative suitability action. OPM added an additional SEVEN years on ongoing criminal conduct to support its charges.

On August 13, 1991, an incident report was filed with the King County Police Department on behalf of your step-daughter. The King County report stated, "1-3 times this year." OPM second intentional falsification of its statements came from the King County Police report and expanded the Police report to fit their suitability action. OPM stated, "she reported you had sexual intercourse with you 3 to 4 times a year for the preceding 10 years."

OPM's third falsifications of charges were, "He did pay $325.50 in costs ($85.50) and victim assessment fees ($100.00), but nothing towards the restitution." (Emphasis added) Fundamental math renders a different result; in fact Petitioner has paid restitution. In addition, Petitioner did have an ongoing appeal of this restitution issue.

1. Washington Court of Appeals 41005-9-I
2. Washington Supreme Court 67596-1
3. USDCWW 02-cv-00074-MJP
4. Ninth Circuit 02-35360

Intentional falsification or misrepresentation will support a negative suitability determination of an applicant to federal employment. Both agencies should be sanctioned for their own intentional falsification with intent to defraud Petitioner from federal employment. Petitioner's Constitutional rights were violated by both agencies on its face. A double standard for the federal agencies that choose to intentionally discriminate and violate federal statutes and its own agency policy and procedures is contrary to the Accardi doctrine, requires federal agencies to follow their own rules and bars administrative agencies from taking action "inconsistent with their internal regulations when it would affect individual rights," *U.S. ex rel Accardi v. Shaughnessy*, 347 U.S. 260, 74 S. Ct. 499 (1954). Morton v. Ruiz, 415 U.S. 199, 235, 94 S. Ct. 1055 (1974).

3. OPM Intentionally made False Statements and Omission with intent to Defraud

To support OPM's May 16, 2001 negative suitability determination, OPM intentionally falsified and misrepresented Petitioners prior criminal conduct to support its initial negative suitability action in 1998 and again in 2001. OPM rescinded its 2001 action. *Kissnes v. OPM*, 792 F2d 133 (Fed.Cir 1986), falsification of records; *Hanker v. Treasury*, 73 MSPR 159 (1997), misrepresentations in application documents; *Buhl v. OPM*, 37 MSPR 305 (1988), Intentional falsification of government documents; *McCreary v. OPM*, 27 MSPR 459 (1985), reckless disregard for the truth.

Petitioner criminal conduct was more than 108 months prior to the September 2000 federal employment application with OSHA. Petitioner had no suitability issues remaining under OPM guidelines, unless it was a statutory debarment. OPM's May 14, 2001 negative suitability determination was based on OPM's intentional falsified criminal conduct statements in support of its category D rating.

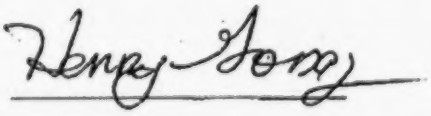
CONCLUSION

Petitioner's Constitutional rights were violated the OPM and OSHA. Petitioner seeks front pay, back pay, punitive, compensatory damages, and all legal fees and costs. Petitioner should be permitted to amend his original USDC complaint after discovery, and any additional relief this Court might impose. Pro Se Veteran seeks his day in court.

For the foregoing reasons, the judgment of the court of appeals should be reversed and remanded to the District Court with instruction.

DATED: May 11, 2006

Respectfully Submitted,



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